Supreme Court, U.S.
FILED
04-1423 APR 21 2005
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ALTERNATE POWER SOURCE, INC.

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent

AND

WESTERN MASSACHUSETTS ELECTRIC COMPANY,

Intervenor.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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April 21, 2005

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QUESTION PRESENTED

Whether rates governing transmission of electricity in interstate commerce in the United States by a regulated utility, previously accepted and approved by the Federal Energy Regulatory Commission under the Federal Power Act, 16, U.S.C. §§ 824d and 824e as the "filed rate," can be unilaterally altered or amended by the utility itself to its advantage by bilateral contracts never filed with or accepted and approved by that Commission, contrary to this Court's longstanding decisions precluding such conduct.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption.

Pursuant to Supreme Court Rule 29.6, petitioner states that it is a corporation organized under Massachusetts laws to provide wholesale electric power to consumers under the open access provisions of federal and state law. Western Massachusetts Electric Company is a public utility subject to the jurisdiction of the Federal Energy Regulatory Commission under the Federal Power Act and is wholly owned by Northeast Utilities, Inc., a United States company..

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PETITION FOR WRIT OF CERTIORARI

Petitioner Alternate Power Source, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The opinions of the Federal Energy Regulatory Commission are published under and are reproduced in the Petition Appendix (Pet. App.) at 4a-9a and at 10a-14a. The judgment of the United States Court of Appeals for the District of Columbia is unpublished and is reproduced at Pet App. 1a-2a. That court's order denying rehearing is unpublished and is reproduced at Pet. App. 3a.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2004. An application for rehearing was denied on January 21, 2005. This Court has jurisdiction over any timely petition filed in this case under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The petition involves the following provisions of the Federal Power Act ("FPA"): 16 U.S.C. §§ 824d and 824e. The pertinent text of these provisions is set forth in the Pet. App. at 15a-22a.

STATEMENT OF THE CASE

In this case, the Federal Energy Regulatory Commission ("FERC", the "Commission") accepted for filing and approved transmission tariffs filed by Western Massachusetts Electric Company ("WMECO") and its parent, Northeast

Utilities, the "NU OATT," which became part of the basic transmission system applicable in the New England area, operated by the New England Electric Power Pool ("NEPOOL"), called the NEPOOL Open Access Transmission Tariff ("NEPOOL OATT"). These transmission rates, filed with FERC and accepted and approved by FERC, required WMECO's retail customers to pay WMECO for any transmission costs related to "congestion charges" and "losses" on its high-voltage transmission system known as PTF service. The NEPOOL OATT and the NU OATT were the applicable transmission tariff filed rates upon which Alternate Power Source ("APS") relied in entering into a one-year contract with WMECO, effective January 1, 2000, to provide firm requirements wholesale power to WMECO to meet forty percent of WMECO's sales to its retail customers. However, after APS had provided a large volume of firm electricity to WMECO and had been paid therefor, WMECO retroactively deducted, from the beginning of the contract period, for alleged "congestion charges" and "PTF line losses," contrary to the terms of the filed tariff. As a result of these violations, APS suffered total contract revenue losses of over $3,000,000 over a 12-month period, and was forced out of the electric supply business.

On October 2, 2002, APS filed a complaint with the FERC against NU and its subsidiary WMECO. APS alleged that WMECO's shifting of the congestion charges and PTF line loss charges to APS violated the NEPOOL OATT and the NU OATT.

In its decision, the FERC denied APS's complaint by ruling that WMECO can enter into bilateral arrangements contrary to the terms of transmission tariffs filed with the FERC and approved by it as the filed rate:

> ...Specifically, WMECO does not violate the NEPOOL OATT, or any other Commission rule or regulation, when it allocates to a power supplier such as APS, in a bilateral arrangement...costs and expenses initially

> assessed to WMECO directly under the NEPOOL OATT.

Pet. App. 13a. See also FERC order denying rehearing, Pet. App. 7a-8a. The U.S. Court of Appeals for the District of Columbia issued a judgment without opinion on November 23, 2004 affirming the FERC's decision, Pet. App. 1a-2a, and an order denying APS's petition for panel rehearing, on January 21, 2005. Pet. App. 3a.

The FERC's decision agreed that the NEPOOL OATT and NU OATT had been accepted and approved by it as the applicable filed transmission rates, and the associated Network Integration Transmission Service Agreement ("NITS"),[1] which directly assessed to WMECO the congestion and transmission costs for its retail customers,[2] but ruled that WMECO could ignore those requirements by undertaking private bilateral transactions.

The Commission's decision violates the filed rate doctrine established by this Court in a long line of cases: *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) ("*Arkla*"); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982); *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964); *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ; and *Louisville &*

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[1] FERC approved the NITS, or "retail transmission" Service Agreement, on February 27, 1998, well before WMECO executed a standard offer supply agreement with APS on December 10, 1999. Order 888 states "if retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail wheeling program, the Commission has exclusive jurisdiction over the rates, terms, and conditions of such transmission and public utilities offering such transmission must comply with the FPA by filing proposed rate schedules under section 205." Order 888, FERC Stats and Regs 31,036 at 31,781 (1996).

[2] Order 888 does not equivocate: "[We] make clear that if a utility chooses, or a state lawfully requires, unbundled retail transmission service, such service should occur under this tariff [the NU and NEPOOL OATTs] unless we specifically approve other terms."

Nashville R.R. v. *Maxwell*, 237 U.S. 94, 97 (1915). Given the importance of the filed rate doctrine in federal public utility law, this Court should grant certiorari and reverse the judgment by the U.S. Court of Appeals for the District of Columbia, which negates FERC's well-established, exclusive federal jurisdiction.

A. The Federal Power Act

The Federal Power Act ("FPA") authorizes FERC to regulate, *inter alia*, the rates and charges connected with the transmission and sale of electricity by utilities. See generally 16 U.S.C. §§ 792, 797. The FPA mandates that all such rates and charges be "just and reasonable," FPA § 205(a), 16 U.S.C. § 824d(a), and that no public utility grant an "undue preference or advantage" or "maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect." FPA § 205(b), 16 U.S.C. § 824d(b). Furthermore, the Act requires that public utilities file with FERC "schedules showing all rates and charges for any transmission or sale [of electricity]," along with "the classifications, practices, . . . regulations" and contracts that affect or are related to these rates and charges. FPA § 205(c), 16 U.S.C. § 824d(c); see also 18 C.F.R. § 35.1(e) ("No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge, or compensation [etc.] . . . which is different from that provided in a rate schedule required to be on file with" FERC.).

Section 205 of the FPA also covers rate changes proposed by public utilities. To effect such changes, the utilities must file new schedules with FERC and provide 60 days' notice to FERC and to the public. FPA § 205(d), 16 U.S.C. § 824d(d). Once such schedules are filed, FERC may (upon complaint or on its own initiative) commence hearings regarding these proposed rates and charges. FPA § 205(e), 16 U.S.C. § 824d(e). Pet App. 16a-17a. FERC may suspend the operation of proposed changes for up to five months after the proposed effective date. *Id.* If the hearing has not concluded

after five months have passed, the changes become effective. However, upon a determination that the rates or charges are unjust or unreasonable, FERC may order refunds with interest upon the hearing's conclusion. *Id.*

Section 206 of the FPA authorizes the FERC, on its own motion or on third-party complaint, to hold a hearing to determine whether a rate or charge is "unjust, unreasonable, unduly discriminatory or preferential." FPA § 206(a), 16 U.S.C. § 824e(a). Pet App. 19a. Upon such a finding, FERC must determine the just and reasonable rate "and shall fix the same by order." *Id.* When it initiates a proceeding, FERC must establish a "refund effective date." Should FERC determine that a utility was charging an unjust or unreasonable rate, the Commission will order the utility to refund the difference between the rate it charged and the new just and reasonable rate for a 15-month period, subject to certain exceptions and considerations. This period begins on the refund effective date. FPA § 206(b), 16 U.S.C. § 824e(b); see also FPA § 206(c), 16 U.S.C. § 824e(c). Pet App. 19a-21a.

Under the FPA, as under other regulatory statutes, a regulated entity may charge—and courts may enforce—only the rate that is filed with the governing regulatory agency (here, FERC). *Arkla*, 453 U.S. at 576-78; see also 16 U.S.C. § 824d(c). This principle is known as the "filed rate" doctrine: a utility "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota*, 341 U.S. at 251. As a corollary, this doctrine "prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992) (citing *Arkla*, 453 U.S. at 578-79).

This petition raises the important question of what constitutes a "filed" rate under the FPA. In particular, this petition addresses whether any public utility subject to a filed rate can change or alter the express terms of that rate by means of a bilateral arrangement never filed with or approved by the FERC.

REASONS FOR GRANTING THE PETITION

This case presents a stark case of non-compliance with the longstanding requirements of the filed rate doctrine, which this Court has recently confirmed as applicable to transmission rates in interstate commerce under the new open access rules of Order 888. *New York, et al. v. FERC, et al.*, 535 U.S. 1 (2002). This Court's review is imperative to restore uniformity in federal law and to bring order to the filed rate doctrine, which is a central element of utility rate regulation under multiple federal Acts. See, *e.g.*, Natural Gas Act, 15 U.S.C. §§ 717-717z; Communications Act, 47 U.S.C. §§ 151-1110.

Under the Federal Power Act, exclusive jurisdiction to regulate the rates charged by sellers of electricity like NEPCO lies with FERC. 16 U.S.C. § 824(b); *New England Power Co.*, 455 U.S. at 340. By granting sole ratemaking authority to FERC, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction." *Southern Cal. Edison Co.*, 376 U.S. at 215-16 ("This was done in the Power Act by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States."). Consistent with its authority, FERC promulgated regulations that specifically prohibit a utility from enforcing a rate other than a rate on file with FERC:

> No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compen-

> sation for or in connection with electric service subject to the jurisdiction of the Commission, ...which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown.

18 C.F.R. § 35.1(e). It is against this backdrop and in the shadow of the Supremacy Clause that courts construing the Federal Power Act and similar statutes have consistently applied the so-called filed rate doctrine to strike down enforcement of rates that have not been accepted by FERC.

The fundamental rule of the filed rate doctrine is that a regulated entity may not charge rates for its services other than those properly filed with the appropriate regulatory authority. See, *e.g.*, *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 221 (1998) (filed rate doctrine applicable to Communications Act); *Arkla*, 453 U.S. at 578 (under the filed rate doctrine "[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively"). "The filed rate doctrine has its origins in [the Supreme Court's] cases interpreting the Interstate Commerce Act, and has been extended across the spectrum of regulated utilities." *Id.* at 577 (internal citations omitted); see also *Louisville*, 237 U.S. at 97 ("Under the [I]nterstate [C]ommerce [A]ct, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext."). "'The considerations underlying the doctrine... are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.'" *Arkla*, 453 U.S. at 577-78 (quoting *City of Cleveland* v. *FPC*, 525 F.2d 845, 854 (1976)).

The FERC, in its decision below, has admitted that the existing filed tariffs under the new open access rules of Order 888, the NEPOOL OATT and the NU OATT, allocate the

"costs and expenses *assessed to WMECO directly under the NEPOOL OATT*." (Emphasis added.) Pet App. 5a. But by contending that WMECO can change the express terms of that filed rate by a bilateral arrangement which was never filed with or approved by the Commission, FERC is in direct conflict with longstanding decisions by this Court.

The critical point is that no rate is a filed rate until the rate components are accepted for filing and approved by the FERC. Section 205 of the Federal Power Act requires a public utility to file with FERC "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 16 U.S.C. § 824d(c). Pet App. 15a.

Furthermore, the state courts cannot simply disregard FERC's conclusive determination setting the express terms of a filed rate by adopting contrary terms in a bilateral arrangement that was not accepted for filing without undermining the primacy of the federal agency under the FPA in regulating rates. See *Entergy La., Inc.* v. *Louisiana Pub. Serv. Comm'n*, 123 S. Ct. 2050, 2056 (2003) (holding under the filed rate doctrine that FERC cost allocations cannot be second-guessed by state authorities). A rate must be either "fixed or...accepted by the Commission" in order to be a "filed rate." *Montana-Dakota*, 341 U.S. at 251. Customer-specific rates never accepted by FERC are not "filed" within the meaning of the filed rate doctrine.

Because FERC never accepted or approved any separate transmission rate for APS, WMECO's attempt to rely on its own unilateral arrangement under state law cannot serve as the basis of contract damages. The contrary holding of the U.S. Court of Appeals below places it in direct conflict with *Arkla*, 453 U.S. 571 (1981).

In *Arkla*, this Court held that a state court is prohibited under the filed rate doctrine from awarding breach of contract damages that were calculated as the difference between the natural gas rate[3] currently filed with the FERC and the rate that would have been charged had the parties properly adhered to the underlying filed rate. The respondent natural gas producers in that case had entered into a contract with the Arkansas Louisiana Gas Company ("Arkla") where respondents agreed to sell Arkla natural gas from a particular field in Louisiana. *Id.* at 573. Under a "favored nations clause" in the contract, Arkla agreed to pay a higher price to respondents in the event that it bought natural gas in this field from a third party at a rate higher than the one it was paying respondents. Respondents filed this contract and its rate arrangement with FERC. Seven years later, respondents filed suit in Louisiana state court, claiming that Arkla violated the contract by producing gas on applicable leaseholds purchased from the United States and paying the United States more than Arkla was paying respondents. Respondents sought damages in the amount of the difference between their received payments and those which Arkla was paying the United States. *Id.* at 574.

The Louisiana state trial court held that the filed rate doctrine barred the award of damages despite its conclusion that Arkla's payments to the United States had triggered the "favored nations clause." The appellate state court affirmed, but the Louisiana Supreme Court reversed. The Louisiana state court determined that, because Arkla failed to inform them about its new leasehold, respondents were unable, as a practical matter, to file the increased rate due to them. Nonetheless, the state court concluded that FERC would have approved this increased rate had respondents known about the

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[3] While *Arkla* involved natural gas regulation under the Natural Gas Act, 15 U.S.C. §§ 717-717z, this Act and the FPA are "in all material respects substantially identical," and therefore are cited interchangeably. *Arkla*, 453 U.S. at 577 n.7 (internal quotation marks omitted).

new leasehold and submitted the new rate for approval. The state court therefore ordered an award of damages measured as the difference between what the court decided respondents would have received and what they did receive. *Id.* at 575.

This Court reversed, holding that, under the filed rate doctrine, a state court may not award contract damages based on a rate that was not accepted for filing or approved by FERC but that might have been approved had it been submitted. *Id.* at 578-79, 584. This Court explained that a state court would undermine the purpose of the Natural Gas Act and FERC's exclusive jurisdiction over rate regulation by awarding damages based on a rate never accepted for filing or approved by FERC and thus never approved as "just and reasonable." *Id.* at 579-80. Under *Arkla*, therefore, a state court's award of damages for breach of a contract whose subject matter is regulated by FERC must be predicated on rates accepted for filing and approved by FERC.

Because WMECO's new rate components for APS had never been accepted for filing by FERC, they cannot serve as the basis for calculating damages. The decision below, by departing from the clear command of *Arkla*, presents a clear issue warranting this Court's review.

The filed rate doctrine is the cornerstone of federal utility rate regulation. Public utilities cannot subvert that doctrine by refusing to file changes to those rates for approval by the FERC. Such strategic manipulations deprive FERC and the public of the opportunity guaranteed in section 205 of the FPA to evaluate rate changes *before* they go into effect in order to determine if they are just, reasonable, and nondiscriminatory. See 16 U.S.C. § 824d(c) & (d). Pet App. 15a-16a. WMECO's position—that it need not file the actual rate, but that it should be awarded damages based on its unilateral claims of the value of those components that cannot be adjudicated in state court, *Montana-Dakota*, 341 U.S. at 250-52—is clearly irreconcilable with the FPA and this Court's precedent. This case illustrates the injustice of this

principle. WMECO cannot unilaterally transfer its own tariff obligations to its customers for certain transmission costs to APS, which has no such obligations under the prior filed tariff. Federal and state courts must defer to the federal agency's determinations of when a rate is accepted for filing, and cannot award damages under the filed rate doctrine if the rate for which damages were awarded was never accepted for filing or approved by the Commission.

Furthermore, requiring APS to make these payments destroyed its ability to be a competitive supplier of electric power in direct conflict with the filed rate approved by the Commission.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below summarily reversed, or the case set for argument.

Respectfully submitted,

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April 21, 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1398 September Term, 2004
Filed On: November 23, 2004
[861622]

Alternate Power Source, Inc.
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

Western Massachusetts Electric Company,
Intervenor

On Petition for Review of Orders
of the Federal Energy Regulatory Commission

Before: EDWARDS AND HENDERSON, Circuit Judges
and WILLIAMS, Senior Circuit Judge

JUDGMENT

The petition for review of orders of the Federal Energy Regulatory Commission was considered on the briefs and the appendix filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED and ADJUDGED by the Court that the petition for review is denied. Petitioner has identified no reversible error in the orders under review regarding the filed rate doctrine, § 24 of the NEPOOL OATT, and Petitioner's request for a hearing. All other objections are dismissed for

lack of jurisdiction because Petitioner did not properly preserve them in its request for rehearing.

Pursuant to DC Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1398 September Term, 2004
Filed On: January 21, 2005
[871754]

Alternate Power Source, Inc.
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

Western Massachusetts Electric Company,
Intervenor

Before: EDWARDS AND HENDERSON, Circuit Judges
and WILLIAMS, Senior Circuit Judge

O R D E R

Upon consideration of petitioner's petition for rehearing filed January 7, 2005, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Michael C. McGrail

Deputy Clerk

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

104 FERC ¶ 61, 255

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and
Nora Mead Brownell.

Alternate Power Source, Inc.

v. Docket No. EL03-9-001

Western Massachusetts Electric
Company and
Northeast Utilities System

ORDER ON REHEARING

(Issued September 10, 2003)

1. On November 29, 2002, Alternate Power Source, Inc. (APS) sought rehearing of the Commission's November 25, 2002 order issued in this proceeding.[1] For the reasons discussed below, we will deny rehearing.

Background

2. On December 10, 1999, APS entered into a one-year bilateral supply agreement (Supply Agreement) with Western Massachusetts Electric Company (WMECO), pursuant to the electric restructuring laws of the State of Massachusetts. Under the Supply Agreement, APS served a portion of WMECO's Standard Offer Service (SOS) and Default

[1] Alternate Power Source, Inc. v. Western Massachusetts Electric Company, *et al.*, 101 FERC ¶ 61,236 (2002) (November 25 Order). An amended rehearing request was timely filed by APS on December 20, 2002, *i.e.*, within 30 days of the date of the Commission's order.

Service (DS) load by providing a wholesale supply service to WMECO. WMECO, in turn, was a network transmission customer of the New England Power Pool (NEPOOL) and was responsible for distribution and related retail services.

3. In a complaint filed by APS on October 8, 2002, APS alleged that WMECO's actions pursuant to the Supply Agreement, specifically its pass-through to APS of certain wholesale congestion charges assessed to WMECO by NEPOOL and WMECO's calculation of line losses, violated the spirit and intent of: (1) the NEPOOL open access transmission tariff (NEPOOL OATT); and (2) the unbundling requirements of Order No. 888.[2] APS further alleged that the Supply Agreement, as interpreted by WMECO in calculating line losses payable by APS, constituted a discriminatory preference in favor of WMECO's affiliate, Select Energy, Inc. (Select Energy), whose line loss obligation under a separate supply arrangement with WMECO was less.

4. In the November 25 Order, we denied APS' complaint. We noted that APS' contract interpretation claims relating to the Supply Agreement were currently being pursued by APS in two state court proceedings filed by APS and that APS had not asked us to rule on these state law claims. We also found that WMECO had not violated the NEPOOL OATT or any other Commission rule or regulation when it allocated to a power supplier such as APS, in a bilateral arrangement, the costs and expenses initially assessed to WMECO directly under the NEPOOL OATT. Finally, we found no undue preference in WMECO's line loss

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[2] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Pubic Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and rev'd in part sub nom.* Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom.* New York v. FERC, 535 U.S. 1 (2002).

calculations or any evidence of undue discrimination in WEMCO's billing of line losses.

APS' Request for Rehearing

5. APS asserts that the November 25 Order erred in its determination that APS could be held responsible for paying congestion charges under the NEPOOL OATT and for paying line losses in the amount calculated by WMECO. APS asserts, in this regard, that WMECO was barred from assigning away its own obligation to pay congestion charges pursuant to the regulatory scheme envisioned by Order No. 888, the NEPOOL OATT, and the Commission's regulations. In addition, APS asserts that the Commission erred in its determination that there was no preferential treatment accorded by WMECO in its calculation of APS' line loss charges and in holding that these line losses were properly calculated.

APS's Motion to Lodge

6. On May 16, 2003, APS filed a motion to lodge testimony presented by WMECO's affiliate, Connecticut Light and Power (CL&P), before the Connecticut Department of Public Utility Control. APS states that this testimony relates to CL&P's congestion and line loss allocations in its standard offer agreements which, APS asserts, are similar in nature to WMECO's rights and obligations as set forth in the Supply Agreement. In an answer filed by Northeast Utilities Service Company (NUSCO) on June 3, 2003, NUSCO points out that the CL&P agreements and the Supply Agreement are not substantially similar because the CL&P agreements address the recovery, by CL&P, of congestion charges and line losses associated with the implementation of new market design rules by ISO New England, Inc. NUSCO further submits that tariff violations and other Commission rule

violations, not the issue of cost responsibility under CL&P's agreements or the SOS Agreement, are the relevant issues in this case. On June 6, 2003, APS filed an answer to NUSCO's answer.

Discussion

Procedural Matters

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[3] prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept APS's answer and therefore will reject it.

8. We will deny APS' motion to lodge. NUSCO asserts (and we agree) that the contract interpretation issues presented by APS' motion to lodge are not at issue in this case for the reasons previously discussed by the Commission in the November 25 Order. In the November 25 Order, we noted that APS' contract claims are currently being pursued in two state court proceedings filed by APS and that APS did not request that we address these issues here. Accordingly, the evidence APS seeks to add to this record on rehearing has no relevance to the issues presented here.

Analysis

9. We will deny APS' request for rehearing. The alleged wrong-doings attributed to WMECO in this case were undertaken, if at all, pursuant to the parties' bilateral agreement. While APS steadfastly insists that it is not asking the Commission to interpret or enforce APS' rights and obligations under the Supply Agreement (given the pendency of these issues in state court actions already filed by APS), APS is doing just that. Specifically, it is the Supply Agreement not the NEPOOL OATT or the Commission's

[3] 18 C.F.R. § 385.213(a)(2) (2003).

rules that address whether and to what extent APS is required to pay for the NEPOOL congestion charges associated with APS' service to WMECO. Similarly, it is the Supply Agreement that must be looked to in deciding whether WMECO's calculation of line losses was appropriate.

10. While APS seeks to rely on the NEPOOL OATT and our open access rules, APS' arguments are, at best, confused. APS assumes without citation or support, for example, that the Federal Power Act and the NEPOOL OATT prohibit WMECO, as a network customer, from assigning to a third party, such as APS, costs for which WMECO may be initially responsible under the NEPOOL OATT. APS, however, is simply mistaken in this regard. There is neither a statutory mandate nor a rule nor even a reason to prohibit such an assignment. Nor does the NEPOOL OATT govern (or limit) the ultimate allocation or calculation of line losses as between WMECO and APS. Our open access rules and the NEPOOL OATT govern the provision of transmission service by a public utility transmission provider (NEPOOL) to a network customer (WMECO). These provisions do not address and were not intended to restrict a network customer's bilateral arrangements with third parties.

11. Finally, we find APS' assertions regarding WMECO's alleged unduly discriminatory preference of its affiliate, Select Energy, to be baseless. APS was responsible under the Supply Agreement for meeting a portion of WMECO's SOS requirements and was subject to a line loss calculation based on that status – as were each of the suppliers relied upon by WMECO to satisfy WMECO's SOS requirements. Select Energy, by contrast, provided interruptible supplies to eight of WMECO's metered retail customers pursuant to a state-monitored contract bidding procedure. Given the significant distinctions between these two services, as discussed by WMECO in its answer to APS' complaint, we find no support for APS' claim that WMECO engaged in any unduly preferential conduct in this case.

The Commission orders:

APS' request for rehearing is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

101 FERC ¶ 236

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Alternate Power Source, Inc.

v. Docket No. EL03-9-000

Western Massachusetts Electric
Company and
Northeast Utilities System

ORDER ON COMPLAINT

(Issued November 25, 2002)

1. On October 2, 2002, Alternate Power Source, Inc. (APS) filed a complaint pursuant to section 206 of the Federal Power Act, naming as respondents Northeast Utilities System (NU) and its subsidiary, Western Massachusetts Electric Company (WMECO). APS alleges that WMECO's pass through of congestion charges and its calculation of line losses under the parties' bilateral supply agreement (now expired) violated the spirit and intent of the New England Power Pool (NEPOOL) open access transmission tariff (OATT), violated the unbundling requirements of Order No. 888, resulted in discriminatory transmission pricing, and constituted a discriminatory preference in favor of respondents' affiliate. For the reasons discussed below, we will deny APS' complaint.

Background

2. APS states that, pursuant to WMECO's retail unbundling, APS entered into a Standard Offer and Default Service Wholesale Sales Agreement (SOS Agreement) with WMECO, for a one year term ending December 31, 2000. WMECO states that under the SOS Agreement, APS was responsible for providing SOS Requirements Service and for paying (as a pass-through obligation from WMECO) certain charges assessed by ISO New England Inc. (ISO-NE) and NEPOOL and other expenses associated with the provision of this service. WMECO further states that in turn, it was responsible for providing Delivery Services, including Regional Network Service (RNS) over NEPOOL's pool transmission facilities (PTF), Local Network Service under WMECO's non-PTF facilities, and firm distribution services under WMECO's distribution services tariff.

3. APS states that relying on this division of responsibility, WMECO passed through to APS transmission congestion charges, for which APS should not be held liable. APS further asserts that while line losses may be passed through to APS, WMECO should have used data from a 1999 loss study rather than the current ISO-NE data on which it relied. APS asserts that in relying on the data it did, WMECO favored its affiliate, Select Energy, Inc. (Select Energy), whose line losses were assessed at a lower rate. APS further asserts that WMECO has applied line losses on a discriminatory basis because WMECO billed its standard offer generation suppliers, including APS, for line losses of 9.05 percent (5.16 percent WMECO's line loss + 3.89 percent NEPOOL's line loss) while billing competitive generation suppliers only WMECO's line loss of 5.16 percent.

4. In support of its claims, APS states that it does not rely, here, on its own interpretation of the SOS Agreement, although it has advanced claims relating to these matters in two state court actions (now pending). Rather than rely on these arguments, APS claims, in effect, that the SOS

Agreement, even if interpreted in the manner relied upon by WMECO, cannot be enforced as written, because to do so would violate the terms of the NEPOOL OATT and would otherwise be discriminatory. Specifically, APS asserts that congestion charges under the NEPOOL OATT must be assessed to, and paid for by, the transmission customer (WMECO) and may not thereafter be passed through under a bilateral arrangement to a power supplier (APS). In addition, line losses must be calculated in a manner that is equal as between SOS suppliers and other suppliers, including WMECO's affiliate.

Notice of Filing and Responsive Pleadings

5. Notice of APS' complaint was published in the Federal Register, with interventions and protests due on or before October 28, 2002. NU and WMECO filed a joint answer.

6. In their answer, respondents assert that the issues raised by APS are contract interpretation issues that are currently pending in the state court proceedings instituted by APS. Respondents state that, in fact, APS makes many of the same arguments that it has made in its breach of contract actions – many of them verbatim. Respondents further assert that WMECO's assignment of congestion charges to APS, under the parties' agreement, was appropriate and in violation of no Commission rule or policy. In addition, Respondents assert that WMECO's calculation of line losses did not favor its affiliate, Select Energy, because APS' firm service, under the SOS Agreement, was fundamentally different than the interruptible service provided to Select Energy. Respondents also assert that the PTF losses applied by WMECO in determining APS Contract Load Quantities, as APS itself concedes, were the actual PTF losses incurred by WMECO.

Discussion

7. We will deny APS' complaint. APS's contract claims are currently being pursued in two state court proceedings and APS does not request that we address these issues. In this circumstance, we are not required to consider whether we have primary jurisdiction over these matters here. Nor do we find any tariff violations under the facts alleged in APS's complaint. Specifically, WMECO does not violate the NEPOOL OATT, or any other Commission rule or regulation, when it allocates to a power supplier such as APS, in a bilateral arrangement – freely entered into by APS – costs and expenses initially assessed to WMECO directly under the NEPOOL OATT. We find no undue preference in WMECO's line loss calculations, which were based on WMECO's actual line losses and calculated in the same manner that WMECO calculated line losses for other SOS suppliers.

8. Finally, we find no discrimination in WMECO's billing of line losses. SOS suppliers sell directly to WMECO and are billed by WMECO under the pass through provisions of the SOS Agreement for a 9.05 percent line loss which consists of WMECO (5.16 percent) and NEPOOL (3.89 percent). Competitive suppliers sell directly to WMECO's retail customers and receive separate transmission services from WMECO and NEPOOL. Therefore, competitive suppliers would be billed by WMECO for a line loss of 5.16 percent and billed by NEPOOL for a line loss of 3.89 percent for a total line loss of 9.05 percent.

The Commission orders:

APS' complaint is hereby denied as discussed in the body of this order.

By the Commission.

(SEAL)

Magalie R. Salas,
Secretary.

APPENDIX E

FEDERAL STATUTES

16 U.S.C. § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service

shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

> (A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and
>
> (B) whether any such clause reflects any costs other than costs which are—
>
> > (i) subject to periodic fluctuations and
> >
> > (ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

> (A) modify the terms and provisions of any automatic adjustment clause, or
>
> (B) cease any practice in connection with the clause, if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, c. 285, § 205, as added August 26, 1935, c. 687, Title II, § 213, 49 Stat. 851, and amended November 9, 1978, Pub.L. 95-617, Title II, §§ 207, 92 Stat. 3142.)

16 U.S.C. § 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion,

the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended (15 U.S.C. 79 et seq.).

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(June 10, 1920, c. 285, § 206, as added August 26, 1935, c. 687, Title II, § 213, 49 Stat. 852, and amended October 6, 1988, Pub.L. 100-473, § 2, 102 Stat. 2299.)

Supreme Court, U.S
FILED
JUN 24 2005
OFFICE OF THE CLERK

(2)

No. 04-1423

In the Supreme Court of the United States

ALTERNATE POWER SOURCE, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission (FERC) correctly decided that, on the facts of this case, certain charges made to petitioner by a utility to which petitioner sold power did not violate a statute, rule, or tariff filed with FERC.

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is unreported. The challenged orders of the Federal Energy Regulatory Commission are reported at 101 F.E.R.C. ¶ 61,236, and 104 F.E.R.C. ¶ 61,255.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2004. A petition for rehearing was denied on January 21, 2005 (Pet. App. 3a). The petition for a writ of certiorari was filed on April 21, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (FERC) jurisdiction over the transmission and wholesale sale of electric energy in interstate commerce, but leaves regulation of retail sales and local distribution of electric power to the States. See 16 U.S.C. 824(b)(1). Under the FPA, utilities may only charge rates and engage in practices that are just, reasonable and not unduly discriminatory. 16 U.S.C. 824d(a) and (b). FERC must replace rates and practices that it finds unjust, unreasonable or unduly discriminatory with just and reasonable rates and practices. 16 U.S.C. 824e(a).

The FPA requires public utilities to file "schedules" showing all "rates and charges" for jurisdictional services, all "practices and regulations affecting such rates and charges," and all "contracts which in any manner affect or relate to such rates, charges * * * and services." 16 U.S.C. 824d(c). The Act prohibits such utilities from making any change in such rates or services prior to giving the Commission and the public sixty days' notice. 16 U.S.C. 824d(d). Those provisions provide the statutory basis for the "filed rate doctrine," which prohibits public utilities from charging rates and engaging in practices not specified in their tariffs. *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 576-578 (1980) (*Arkla*); *Town of Norwood* v. *New England Power Co.*, 202 F.3d 408, 416 (1st Cir.), cert. denied, 531 U.S. 818 (2000).[1]

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[1] *Arkla* interpreted the filed-rate provision of the Natural Gas Act, 15 U.S.C. 717c(d), a provision virtually identical to 16 U.S.C. 824d(d). Accordingly, the two provisions are properly interpreted consistently with one another. 453 U.S. at 577 n.7.

2. This case involves FERC's dismissal of petitioner's complaint, which alleged that certain provisions of a power agreement between petitioner, a supplier of electric power, and Western Massachusetts Power Company (WMECO), a public utility, violated rates on file with FERC.

a. The New England Power Pool (NEPOOL) is a regional power pool, operated by an independent system operator (ISO).[2] NEPOOL uses "pool transmission facilities" to provide regional network transmission service under its own tariff. WMECO is a subsidiary of Northeast Utilities, Inc., a registered public utility holding company. WMECO purchases electric power from suppliers that it sells to retail customers in Massachusetts, and it uses NEPOOL's transmission facilities, in part, to do so. Pet. App. 11a. Under NEPOOL's tariff, certain "transmission congestion charges" and "line loss charges" may be assessed to its customers, such as WMECO. *Id.* at 12a.

b. Petitioner and WMECO entered into a Standard Offer and Default Service Wholesale Sales Agreement (SOS Agreement) for the year 2000. Under the SOS Agreement, petitioner was responsible for selling electricity to WMECO for resale to WMECO's retail sales customers, and WMECO was responsible for assuring delivery of the power. WMECO in turn obtained regional network transmission service under the NEPOOL tariff. Based on its interpretation of the SOS Agreement, WMECO passed through to petitioner NEPOOL's transmission-congestion charges and line loss charges. Pet. App. 11a.

3. Petitioner filed two separate breach-of-contract actions against WMECO in the Norfolk Division of the Mas-

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[2] The NEPOOL facilities are operated by ISO New England, Inc. See *New England Power Pool*, 79 F.E.R.C. ¶ 61,374 (1997), order on reh'g, 85 F.E.R.C. ¶ 61,242 (1998). For simplicity, NEPOOL and ISO New England are both referred to as "NEPOOL."

sachusetts Superior Court, alleging that the pass-through of those costs breached the SOS Agreement. See 101 F.E.R.C. at 62,013 n.4.[3] Those cases are currently pending.

4. On October 2, 2002, petitioner filed a complaint with FERC. The complaint alleged that any provisions of the SOS Agreement that permitted WMECO to pass through to petitioner transmission-congestion and line-loss charges assessed to WMECO as a NEPOOL transmission customer would, *inter alia*, violate the NEPOOL tariffs. Pet. App. 10a-12a.

On November 25, 2002, the Commission dismissed petitioner's complaint, on the ground that WMECO's pass-through of NEPOOL charges to petitioner did not result in any of the violations alleged. Pet. App. 10a-14a. The Commission found that WMECO did not "violate the NEPOOL [tariff], or any other Commission rule or regulation" by allocating "to a power supplier, such as [petitioner], in a bilateral arrangement—freely entered into by [petitioner]—costs and expenses initially assessed to WMECO directly under the NEPOOL [tariff]." *Id.* at 13a. Rather, "[s]haring the risk of cost responsibility under bilateral transactions * * * is a private contractual matter[.]" 101 F.E.R.C. at 62,013 n.7 (quoting *ISO New England, Inc.*, 95 F.E.R.C. ¶ 61,384, at 62,428 (2001), reh'g denied, 100 F.E.R.C. ¶ 61,254 (2002)).

5. Petitioner filed a request for rehearing, which FERC denied. Pet. App. 4a-9a. FERC specifically rejected petitioner's contention that, because the NEPOOL tariff provided that NEPOOL's customers (like WMECO) would pay to NEPOOL the cost of congestion and line-loss charges, WMECO could not in turn contract to pass those same

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[3] The appendix to the petition omits the footnotes from FERC's November 25, 2002, order. This brief accordingly cites those footnotes to the published version of FERC's order.

charges through to its own suppliers, such as petitioner. The Commission noted that petitioner had failed to provide "citation or support" for its assumption "that the FPA and the NEPOOL [tariff] prohibit[ed] WMECO, as a network customer, from assigning" NEPOOL charges "to a third party, such as [petitioner]." *Id.* at 8a. The Commission found that the NEPOOL tariff does not "govern (or limit)" the ultimate cost allocations "between WMECO and [petitioner]," because it "do[es] not address and w[as] not intended to restrict a network customer's bilateral arrangements with third parties." *Ibid.*

6. The court of appeals affirmed in an unpublished judgment. Pet. App. 1a-2a. The court stated that "[p]etitioner has identified no reversible error in the orders under review regarding the filed rate doctrine, [a provision] of the NEPOOL [tariff], and [p]etitioner's request for a hearing." *Id.* at 1a. The court also determined that petitioner had failed to preserve other objections in its request for rehearing before FERC. *Ibid.*; see 16 U.S.C. 825*l*(b) (court on review of FERC action may not consider any objection "unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do").

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of petitioner's fact-bound claim is unwarranted.

1. The court of appeals disposed of this case in an unpublished, summary order. Further review by this Court of such an order, which disposes of the claims in a particular case, but establishes no new legal principle or rule, is ordinarily unwarranted. That principle applies with full

force here, where the court of appeals' decision established at most that, on the facts of this case, petitioner had failed to make out a claim that WMECO's pass-through of its congestion and line-loss costs violated a term of the NEPOOL tariff. Even if there were some doubt that the court of appeals had correctly disposed of that claim, further review by this Court to examine such a case-specific holding in an unpublished opinion would be unwarranted.

2. In any event, FERC correctly disposed of petitioner's complaint, and the court of appeals correctly denied petitioner's petition for review. Petitioner's primary complaint was that the NEPOOL tariff allocated congestion and line-loss charges to WMECO and that such an allocation precluded WMECO from in turn passing on those charges to its own suppliers, such as petitioner.

As FERC explained, petitioner's claim is "confused." Pet. App. 8a. Petitioner fails to identify any provision in NEPOOL's tariff or any FERC rule that prohibits a transmission customer from passing through transmission charges to a third party under a voluntarily executed bilateral contract. To the contrary, the Commission has specifically ruled that provisions in the NEPOOL tariff governing allocation of costs to NEPOOL's transmission customers do *not* affect bilateral contracts under which those customers contract with third parties to further share the costs. *ISO New England*, 95 F.E.R.C. at 62,428.

In short, the NEPOOL tariff governs the relationship between NEPOOL and WMECO. But "it is the Supply Agreement" between WMECO and petitioner, "not the NEPOOL [tariff] or the Commission's rules that address whether and to what extent [petitioner] is required to pay for the NEPOOL congestion charges" and line-loss charges. Pet. App. 7a-8a. There is nothing in federal law that prohibits WMECO "from assigning to a third party,

such as [petitioner], costs of which WMECO may be initially responsible under the NEPOOL [tariff]. * * * There is neither a statutory mandate nor a rule nor even a reason to prohibit such an assignment." *Id.* at 8a. The NEPOOL tariff and FERC's rules "do not address and were not intended to restrict a network customer's bilateral arrangements with third parties." *Ibid.*

To be sure, petitioner has alleged in its state-court actions that, under the SOS Agreement that does govern the relationship between WMECO and petitioner, WMECO was not permitted to pass on congestion and line-loss charges to petitioner and petitioner was not obligated to pay them. But petitioner insisted before FERC that "it does not rely, here, on its own interpretation of the SOS Agreement." Pet. App. 11a; see *id.* at 7a ("[Petitioner] steadfastly insists that it is not asking the Commission to interpret or enforce [petitioner's] rights and obligations under the Supply Agreement."); *id.* at 13a ("[Petitioner's] contract claims are currently being pursued in two state court proceedings and [petitioner] does not request that we address those issues."). Accordingly, it must be assumed, for purposes of this case, that WMECO's pass-through of the congestion and line-loss charges was consistent with its contract with petitioner. As FERC recognized, nothing in the NEPOOL tariff or FERC's rules precludes giving effect to such terms in a bilateral contract.

3. Petitioner contends (Pet. 6) that the Commission—and the D.C. Circuit—permitted "non-compliance with the longstanding requirements of the filed rate doctrine[.]" That contention, however, is based on petitioner's claim (Pet. 8) that the Commission approved an arrangement under which "WMECO can change the express terms of [the filed rate in the NEPOOL tariff] by a bilateral arrangement which was never filed with or approved by the

Commission." As explained above, however, because the NEPOOL tariffs did not govern WMECO's arrangements with petitioner, WMECO's pass-through of costs did not violate the NEPOOL tariff. Furthermore, information about a wholesale contract such as that between petitioner and WMECO, including its key terms, must be filed with the Commission. See 16 U.S.C. 824d(c). Thus, FERC's decision in this case, and the D.C. Circuit's affirmance, were entirely consistent with the longstanding requirements of the final rate doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2005